***United States Court of Appeals***

***for the Second Circuit***

# APPENDIX

75-7230



UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ANNETTE HEYMAN,

Plaintiff,

VS.

COMMERCE AND INDUSTRY INSURANCE COMPANY,

Defendant.

CIVIL ACTION

NO. 75-7230

INDEX TO APPENDIX

B P/S

PAGINATION AS IN ORIGINAL COPY

TO THE SHERIFF OF THE COUNTY OF HARTFORD OR HIS DEPUTY, GREETING:

BY AUTHORITY OF THE STATE OF CONNECTICUT, You are hereby commanded to summon COMMERCE AND INDUSTRY INSURANCE COMPANY, a New York Corporation having an office and place of business at 125 Maiden Lane, in the City, County and State of New York, by service upon the Insurance Commissioner as agent for service of process, in the manner prescribed by the General Statutes, to appear before the SUPERIOR COURT to be held at BRIDGEPORT, in and for the County of Fairfield, on the FOURTH TUESDAY OF SEPTEMBER, 1974, said appearance to be made by said COMMERCE AND INDUSTRY INSURANCE COMPANY or its attorney, by filing a written statement of appearance with the Clerk of said Court, on or before the second day following such return date, then and there to answer unto ANNETTE HEYMAN of 10 West Street, in the City of Danbury, County of Fairfield and State of Connecticut, in a civil action wherein the plaintiff complains and says:

1. On or about April 4, 1972, defendant authorized and issued a policy of insurance, numbered SMP 601 0163, duly signed by its agent, William Campbell, in the Town of Fairfield, Connecticut, wherein defendant, in consideration of an annual

COHEN AND WOLF P.C.
ATTORNEYS AT LAW
10 MIDDLE STREET
BRIDGEPORT, CONN. 06604
COMP. #10031

premium of $15,477, agreed to insure plaintiff against all loss and damage by fire for a term of three (3) years commencing April 10, 1972, at several properties owned by insured and located in the States of Connecticut and Massachusetts.

2. Said policy of insurance is a standard fire insurance policy as required by the laws of the State of Connecticut and contains a replacement cost endorsement (Exhibit A).

3. On September 10, 1972, a fire occurred at premises located at a shopping complex in Westfield, Massachusetts which premises were then insured by said policy, totally destroying a building then leased to Sears, Roebuck and Company for use as an auto service station and warehouse, resulting in an actual loss to the plaintiff in the amount of $247,265.00.

4. Plaintiff gave defendant immediate notice of said loss, and, on December 14, 1972, filed with defendant a written proof of loss statement in the form required (Exhibit B).

5. Defendant refused to accept plaintiff's claim, and failed and refused to offer plaintiff any compensation for the loss.

6. On or about April 1, 1973, plaintiff invoked the appraisal procedure under the terms of the insurance policy and the parties submitted to appraisal the sole question of replacement cost of the building.

COHEN AND WOLF
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10 MIDDLE STREET
BRIDGEPORT, CONN. 06604
COMP. #10032

7. On or about June 1, 1973, in direct contravention of Paragraph One of the replacement cost coverage endorsement of plaintiff's insurance policy, defendant advised plaintiff that the appraisal of the Westfield property could not go forward unless the question of actual cash value was determined as well as the question of replacement cost and defendant ordered its appraiser to stop all work in connection with the appraisal.

8. Defendant continued to refuse to pay any amount to plaintiff, despite the fact that plaintiff was obligated under the terms of her lease with the tenant, to construct new premises for the tenant and was obliged to advance substantial sums to honor said obligation.

9. On August 2, 1973, defendant, while in the State of Connecticut, entered into a settlement agreement with the plaintiff, duly signed by Walter J. Owens, its Assistant Secretary, by which agreement the parties promised to release and forever discharge any and all claims against each other, in consideration of defendant's unconditional promise to pay to plaintiff the sum of $187,500.00 (Exhibit C).

10. The above mentioned agreement, executed while new premises were under construction and after the foundation had been completed, provides for payment to be made to plaintiff by defendant in two installments: $150,000 which was in fact paid upon execution of the settlement agreement; and, $37,500 to be paid upon completion of construction of the walls and roof of the new building.

COHEN AND WOLF
ATTORNEYS AT LAW
99 MIDDLE STREET
BRIDGEPORT, CONN. 06604
COMP. #10032

11. On or about August 22, 1973, plaintiff notified defendant that the walls and roof of the building had been completed, and requested payment of the balance of $37,500 then due in accordance with the terms of the settlement agreement.

12. Defendant has breached said settlement agreement by failing and refusing to pay said balance due and owing.

13. As a result of defendant's breach of the contract of insurance and its subsequent failure and refusal to honor the settlement agreement, plaintiff has not been reimbursed either for its actual loss or for the amount agreed upon in settlement of its claim and, in addition, has been compelled to expend and to advance substantial additional sums of money for interest and carrying charges and for reconstruction of the premises thereby damaging plaintiff's relationship with its tenant and causing severe and irreparable loss.

WHEREFORE, THE PLAINTIFF CLAIMS:

1. $100,000.00 damages;

2. Such other and further relief as in equity may appertain.

Jonathan S. Bowman of Fairfield, Connecticut, is recognized in the sum of $100.00 to prosecute, etc.

Of this writ, with your doings thereon, make due service and return.

Dated at Bridgeport, Connecticut this 15th day of August, 1974.

Richard L. Albrecht, Commissioner
of the Superior Court for Fairfield
County

Please enter the
appearance of:

Cohen & Wolf, P.C.
10 Middle Street
Bridgeport, Connecticut
Computer #10032

for the plaintiff.

a true copy
attest
Nathan Tiotsby
Deputy Sheriff
Hartford County

COHEN AND WOLF
ATTORNEYS AT LAW
10 MIDDLE STREET
BRIDGEPORT, CONN. 06604
COMP. #1003

STATE OF CONNECTICUT )
) AFFIDAVIT OF ANNETTE HEYMAN
COUNTY OF FAIRFIELD )

Before me, the undersigned authority, personally appeared Annette Heyman, who being first duly sworn, deposes and says:

1. I am the owner of real property located at 22-50 Main Street, Westfield, Massachusetts. The only encumbrance with regard to this property, in addition to outstanding leases, is a mortgage to Springfield Institute for Savings.

2. On or about September 10, 1972, at or about 6:00 P.M., a fire occurred at the Sears, Roebuck complex destroying a building located at the rear of the Sears, Roebuck store, which building was used for sales, warehouse, and automotive service.

3. As a result of this fire, I suffered a total loss as to this building and there are no other contracts of insurance with respect to this property.

4. My loss, calculated on a replacement cost basis, consists of the following:

| | | |
|---|---|---|
| (a) | Construction cost for replacement of building..... | $ 219,565.00 |
| (b) | Architectural fee for plans, specifications, and supervision..... | 20,000.00 |
| (c) | Fee for engineering services..... | 7,000.00 |
| (d) | Owner's risk insurance..... | 1,700.00 |
| | | $ 247,265.00 |

Further affiant saith not.

Annette Heyman

Sworn to and subscribed before me this 14th day of December, 1972.

Exhibit B

212 747-1580

AGREEMENT

Agreement executed Aug ~ 1973 by Annette Heyman, 8 West Street, Danbury, Connecticut and the Commerce and Industry Insurance Company, 125 Maiden Lane, New York, New York.

WITNESSETH:

WHEREAS, Annette Heyman, hereinafter referred to as "insured", purchased a policy of insurance from the Commerce and Industry Insurance Company, hereinafter referred to as "insurer", the policy being effective April 10, 1972 and covering among other properties, real property located at 22-50 Main Street, Westfield, Massachusetts,

WHEREAS, on or about September 10, 1972, a fire occurred at the Sears, Roebuck complex located at the above mentioned property, which fire destroyed a building located therein,

WHEREAS, insured intends to construct a new building at the Sears, Roebuck complex in order to replace the building which was destroyed and construction of the new building has already commenced,

WHEREAS, insured has made a claim under the above-mentioned insurance policy in the amount of $247,265 as evidenced by the insured's affidavit, dated December 14, 1972,

WHEREAS, insurer has disputed the amount of the loss sustained by insured as a result of the above-mentioned fire,

WHEREAS, in an effort to avoid litigation, the parties have agreed to compromise and settle the above-mentioned claim,

WHEREAS, in consideration of the mutual agreements herein contained, it is agreed as follows:

1. In consideration for payment by insurer to insured of $187,500, the parties for themselves, their successors and assigns, agree to remise, release, and forever discharge any and all claims which they may have against each other arising under the above-mentioned insurance policy including, but not limited to, insured's claim in connection with the above-mentioned fire loss.

2. Payment of the $187,500 shall be made as follows:

$150,000 to be paid, all cash, upon execution of this agreement and $37,500, to be paid, all cash, when insured has proceeded to the stage of construction of the new building where said building shall be watertight - in other words, upon completion of construction of the walls and roof of said building.

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 7 day of Aug, 1973.

Signed, Sealed & Delivered in the presence of:

Annette Heyman

COMMERCE AND INDUSTRY INSURANCE COMPA

By

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| ANNETTE HEYMAN, | : | |
| | : | |
| Plaintiff, | : | CIVIL ACTION |
| | : | |
| vs. | : | NO. B 74-330 |
| | : | |
| COMMERCE AND INDUSTRY INSURANCE COMPANY, | : | |
| | : | |
| | : | AMENDMENT TO COMPLAINT |
| Defendant. | : | |

Pursuant to Rule 15(a) F.R.C.P., plaintiff hereby amends her complaint by deleting paragraph 13 and by substituting the following therefor:

"13. As a result of defendant's breach of the aforesaid settlement agreement, plaintiff has not been reimbursed for the actual expense of reconstruction to the extent of the full amount agreed upon in settlement of its claim; and, in addition, plaintiff has been compelled to expend and to advance substantial moneys for interest and carrying charges and for reconstruction of the premises and has been delayed in the performance of her obligations to her tenant, thereby damaging relations with said tenant and causing severe and irreparable loss and damage."

THE PLAINTIFF

By Lawrence P. Weisman

Lawrence P. Weisman of
Cohen & Wolf, P.C. her
Attorney
10 Middle Street
Bridgeport, Connecticut 06604
368-0211

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| ANNETTE HEYMAN, | : | CIVIL ACTION |
| Plaintiff, | : | NO. B 74-330 |
| vs. | : | OCTOBER 1, 1974 |
| COMMERCE AND INDUSTRY INSURANCE COMPANY, | : | ANSWER |
| Defendant. | : | |

1. The defendant admits the issuance of an insurance policy as alleged in Paragraph 1 of the Complaint.

2. The defendant admits that a fire occurred on September 10, 1972 as alleged in Paragraph 3 of the Complaint, but the defendant denies the allegations concerning the amount and extent of the damage.

3. The defendant admits the execution of a settlement agreement as alleged in Paragraph 9 of the Complaint, but the defendant denies the allegation of an unconditional promise to pay the plaintiff the sum of $187,500.00.

4. The defendant admits that the settlement agreement provided for payment to the plaintiff by the defendant in two (2) installments, and that the first installment of $150,000.00 was in fact paid. However, the defendant alleges that the second installment of $37,500.00 was to be paid only if the insured building was replaced by a new building constituting a replacement of the original structure pursuant to the conditions of the insurance policy.

5. It is admitted as alleged in Paragraph 11 of the Complaint that the plaintiff requested payment of the sum of $37,500.00, but

it is denied that said sum was due in accordance with the terms of the settlement agreement.

6. Paragraphs 2 and 4 of the Complaint are admitted.

7. Paragraphs 5, 6, 7, 8, 12 and 13 of the Complaint are denied.

First Special Defense:

The subject insurance policy provides in part as follows:

> "No suit or action on this policy for the recovery of any claim shall be sustainable in a court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss."

In as much as the loss is alleged to have occurred on September 10, 1972, and the process by which this action was instituted was served on or about August 16, 1974, this action was not commenced within twelve months next after inception of the loss.

Second Special Defense:

In the settlement agreement referred to in the complaint, the loss was adjusted for $187,500.00 covering replacement of the original structure. The actual cash value of the property was $150,000.00. If the plaintiff had replaced the structure in essentially the same condition which existed prior to the loss and in accordance with the conditions in the policy, the plaintiff would have been entitled to the sum of $187,500.00. However, the plaintiff did not replace the building in essentially the same condition which existed prior to the loss, but instead, the plaintiff constructed a much smaller building which did not constitute a replacement of the original structure. Under these circumstances, the plaintiff was entitled to recover only the actual cash value of the building computed on an actual cash value basis of $150,000.00, which amount the plaintiff has already been paid by the defendant.

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| ANNETTE HEYMAN, Plaintiff, | : | CIVIL ACTION |
| vs. | : | NO. B 74-330 |
| COMMERCE AND INDUSTRY INSURANCE COMPANY, Defendant. | : | PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT |

Plaintiff moves the Court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law; or, in the alternative,

2. If summary judgment is not rendered in plaintiff's favor upon the whole case or for all the relief asked and a trial is necessary, that the Court, at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts are actually and in good faith controverted, and thereupon make an order specifying the facts that appear without controversy and directing such further proceedings in the action as are just; or,

COHEN AND WOLF, P.C.
ATTORNEYS AT LAW
10 MIDDLE STREET
BRIDGEPORT, CONN. 06604
COMP. #10032

3. If it should appear that there is no genuine issue as to any material fact other than the nature and extent of the consequential damages claimed by plaintiff, that the Court enter a summary judgment for the plaintiff on the issue of liability only and order further proceedings limited to the question of such consequential damages.

This motion is based upon

a. The Complaint;

b. The Answer and Affirmative Defenses;

c. The Exhibits attached to the Complaint;

d. The Affidavit of Samuel J.Heyman and Exhibit attached hereto; and,

e. The Memorandum attached hereto.

Dated at Bridgeport, Connecticut this 21th day of October, 1974.

Lawrence P. Weisman of
Cohen & Wolf, P.C.
Attorney for Plaintiff
10 Middle Street
Bridgeport, Connecticut 06604
368-0211

COHEN AND WOLF P.C.
ATTORNEYS AT LAW
10 MIDDLE STREET
BRIDGEPORT, CONN. 06604
COMP. #10032

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| ANNETTE HEYMAN, Plaintiff, | : | CIVIL ACTION NO. B74-330 |
| vs. | : | AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT |
| COMMERCE AND INDUSTRY INSURANCE COMPANY, Defendant. | : | |

STATE OF CONNECTICUT )
) ss.: Westport, October 21, 1974
COUNTY OF FAIRFIELD )

SAMUEL J. HEYMAN, being duly sworn, deposes and says:

1. I am the son of Annette Heyman, plaintiff herein and am actively engaged in the management and supervision of her business affairs and properties including the real property which was the subject of the loss in this action. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of plaintiff's motion for summary judgment.

2. On September 10, 1972, a fire occurred at premises located at a shopping complex owned by the plaintiff in Westfield, Massachusetts, substantially or totally destroying an auto service and warehouse building then leased to and occupied by Sears, Roebuck and Company.

3. Said premises were insured by the defendant against loss due to fire under the terms of a "Special Multi-Peril Policy" numbered SMP 601 0163 (Exhibit A to Complaint), which policy was then in full force and effect.

4. Plaintiff promptly caused notice of said loss to be given to defendant and, on December 14, 1972, filed with defendant a written proof of loss statement (Exhibit B to Complaint), all as required by said policy.

5. Defendant contested the amount of the loss as stated on Exhibit B to the Complaint and failed to make any payments under the policy.

6. Plaintiff, being obligated by the terms of her lease with Sears, Roebuck and Company to construct new premises, commenced such construction pending completion of appraisal procedures under the policy and resolution of the dispute between the parties.

7. After said construction had commenced (as recited in the fourth "WHEREAS clause" in Exhibit B to the Complaint) and at a time when the foundation for the new building had been completed, the plaintiff and the defendant, acting by Walter J. Owens, its Assistant Secretary, agreed to compromise the amount of the claim; to abandon their respective claims and demands under the policy; and, to release and discharge each other from all claims and demands arising out of or under the policy, in consideration of defendant's unconditional agreement to pay the sum of $187,500.00 in cash, $150,000.00 upon execution of the settlement agreement and the balance of $37,500.00 upon completion of construction of the walls and roof of the new building.

8. Defendant did pay to plaintiff the sum of $150,000 on August 2,1973, as agreed, but has failed and refused to pay the balance of $37,500.00 as provided in the settlement agreement and,

despite the fact that plaintiff, in reliance upon defendant's unconditional promise to pay said sum and in furtherance of the discharge of her obligation to her tenant, caused said construction to be completed and, on or about August 22, 1973, gave notice of such completion to defendant.

9. Plaintiff has made no claim under the policy of insurance since the date of execution of the settlement agreement but has brought an action to enforce the terms of the settlement agreement and for consequential damages arising out of defendant's failure to comply with the terms thereof.

10. Defendant's answer raises no substantial issue with regard to any material fact.

11. Defendant's affirmative defenses relate solely to a claim under the policy and, as such are inapplicable to this action on the settlement agreement.

12. Defendant's assertion of its first affirmative defense is in contravention of my agreement with counsel for the defendant embodied in my letter of September 6, 1973, attached hereto as Exhibit A.

13. Defendant's assertion of its first and second affirmtive defenses is in contravention of the language and intent of paragraph 1 of the settlement agreement.

SJH

SAMUEL J. HEYMAN

Subscribed and sworn to before me this day of October, 1974.

Notary Public

| | |
|---|---|
| SENT TO | Sigmund Sessler Esquire |
| STREET AND NO. | Gwertzman, Sessler, Nagelberg & Pfeffer<br>115 Broadway |
| P.O., STATE AND ZIP CODE | New York, New York 10006 |

OPTIONAL SERVICES FOR ADDITIONAL FEES

RETURN RECEIPT SERVICES
1. Shows to whom and date delivered ..... 15¢
With delivery to addressee only ..... 65¢
2. Shows to whom, date and where delivered .. 35¢
With delivery to addressee only ..... 85¢

DELIVER TO ADDRESSEE ONLY ..... 50¢
SPECIAL DELIVERY (extra fee required)

PS Form 3800 Apr. 1971 — NO INSURANCE COVERAGE PROVIDED— NOT FOR INTERNATIONAL MAIL — (See other side) — GPO : 1972 O - 460-743

No. 6

September 6, 1973

Sigmund Sessler, Esquire
Gwertzman, Sessler, Nagelberg & Pfeffer
115 Broadway
New York, New York 10006

Re: Your File No. 02978-G
Westfield, Massachusetts

Dear Mr. Sessler:

This will confirm our agreement of today to the effect that we will refrain from instituting any legal action on the policy and/or settlement agreement dated August 2, 1973, in consideration for your company's waiving any rights it may have had under the provision requiring the insured to commence legal action within twelve months after inception of the loss. It is understood that in the event the insured shall deem legal action necessary, you have agreed to waive this defense, and in not instituting action at this time, we are relying upon your representation.

I still trust that you will abide by our settlement agreement and that we can expect the $37,500 payment some time next week.

Very truly yours,

Samuel J. Hayman

SJH:md
Certified Mail No. 061226

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ANNETTE HEYMAN,

Plaintiff,

VS.

COMMERCE AND INDUSTRY INSURANCE COMPANY,

Defendant.

CIVIL ACTION

NO. B74-330

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

November 5, 1974

In accordance with the provisions of Rule 56, Federal Rules of Civil Procedure, defendant moves the court for a summary judgment on the ground that the pleadings, exhibits, other matters of record, and the affidavits of Max J. Gwertzman and Eugene W. Fitzgerald, attached hereto, show that there is no dispute as to any material fact and that the defendant is entitled to a judgment as a matter of law.

Dated at Norwalk, Connecticut this 5th day of November 1974.

THE DEFENDANT

BY: _____

John Keogh, Jr. 31358
Keogh, Candee & Burkhart
34 Wall Street
P.O. Box 126-Belden Station
Norwalk, CT 06852

OUR FILE
NO.02978-G
MJG:tg

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

----------X

ANNETTE HEYMAN,

Plaintiff,

-against-

COMMERCE AND INDUSTRY INSURANCE COMPANY,

Defendant.

CIVIL ACTION
NO. B 74-330

AFFIDAVIT

---------- X

STATE OF NEW YORK )
CITY OF NEW YORK ) SS.:
COUNTY OF NEW YORK )

EUGENE W. FITZGERALD, being duly sworn, deposes and says:

That he is the Assistant Vice President of Toplis and Harding, Inc., Insurance Adjusters, having their principal place of business at 111 John Street, in the Brough of Manhattan, City and State of New York.

That your deponent was retained by the Commerce and Industry Insurance Company to investigate the nature of the loss alleged to have occurred to the plaintiff's building in Westfield, Massachusetts, and to ascertain and determine the amount of damage which may have been sustained.

Your deponent, after several visits to the property, and after considerable discussion with representatives of the plaintiff, finally arrived at an actual cash value of the

property damaged as $150,000. and it was agreed that if the building were substantially restored to the same condition as it existed before the loss, the replacement cost would be $187,500. The Insurance Underwriters represented by your deponent agreed to this disposition. $150,000 was paid to the plaintiff and it was further agreed that when the building was replaced, the balance of the money would be paid, namely, $37,500.

It should be noted that in the stipulation of settlement which was executed, the following "WHEREAS" clause appears:

> "WHEREAS, insured intends to construct a new building at the Sears, Roebuck complex in order to replace the building which was destroyed and construction of the new building has already commenced,"

The original building had an area of approximately 14,000 square feet. The assured notified the Underwriters that the building was substantially completed. Your deponent was requested to go to the site and report as to whether the building had been substantially replaced in accordance with the policy conditions. When your deponent arrived at the location, he found that the building which was in the process of erection consisted of approximately 4,000 square feet instead of the original structure of 14,000 square feet. Your deponent immediately reported these facts to the Commerce and Industry Insurance Company and advised them that the building which was being replaced did not, in any way, comply with the terms and

20

OUR FILE
NO.02978-G

conditions of the replacement portion of the policy issued by the defendant to the plaintiff.

EUGENE W. FITZGERALD

Sworn to before me this
1st day of November, 1974.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

---

ANNETTE HEYMAN,

Plaintiff,

-against-

COMMERCE AND INDUSTRY INSURANCE COMPANY,

Defendant.

---

CIVIL ACTION
NO. B 74-330

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK )
CITY OF NEW YORK ) ss.:
COUNTY OF NEW YORK )

MAX J. GWERTZMAN, being duly sworn, deposes and says:

That he is an attorney, duly licensed to practice in the courts of the State of New York.

That he is a member of the firm of GWERTZMAN, HAGELBERG & PFEFFER, which previously was known as GWERTZMAN, HESSLER, HAGELBERG & PFEFFER.

That your deponent was consulted by the COMMERCE AND INDUSTRY INSURANCE COMPANY in connection with this claim while it was in the process of adjustment.

That your deponent participated in a meeting which resulted in an agreement to pay the sum of $130,000 as the actual cash value of the building which was the subject matter

OUR FILE
NO.02978-G

of the loss which occurred at Westfield, Massachusetts on September 10, 1972. In the course of the adjustment, it was specifically agreed that the replacement value of the building in approximately the same condition that existed prior to the loss, would be $187,500. and that when the building was replaced substantially as it existed before the loss and notification was given to the Commerce and Industry Insurance Company and the new building inspected, the additional payment of $37,500. would be made.

At no time was there any extension given as to the time of suit. The letter which is attached to the moving papers dated September 6, 1973 is nowhere reflected in our file. Mr. Sessler, who has retired from the firm and has not been with us since December of 1973, never handled this matter. All negotiations in regard to this matter were handled directly with your deponent and under no circumstances did your deponent, or any member of his firm have any authority to waive policy conditions. This would have to come directly from the defendant, the Commerce and Industry Insurance Company.

Furthermore, a complaint was made to the Insurance Department by the plaintiff and annexed hereto is a copy of the letter which was sent to the Insurance Department by the Commerce and Industry Insurance Company, explaining the entire transaction

OUR FILE
NO.02978-G

involved herein. The Insurance Department took no further action in the matter after the receipt of this letter and the suit was instituted on August 16, 1974.

MAX J. GWERTZMAN

Sworn to before me this
1st day of November, 1974.

HELEN MARIE LARKIN
Notary Public, State of New York
No. 24-7663204
Qualified in Bronx County
Commission Expires March 30, 1976

File No.
02978-G
MJG:bl

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
----------X

ANNETTE HEYMAN,

Plaintiff,

Civil Action
No. B 74-330

-against-

COMMERCE AND INDUSTRY INSURANCE COMPANY,

AFFIDAVIT

Defendant.

----------X

STATE OF NEW YORK )
) SS.:
COUNTY OF NEW YORK )

MAX J. GWERTZMAN being duly sworn, deposes and says:

Your deponent was retained by the COMMERCE AND INDUSTRY INSURANCE COMPANY during the course of negotiations concerning the settlement of a fire loss by the plaintiff for property located at Westfield, Massachussets.

That in the course of the settlement negotiations Samuel J. Heyman, Esq., who was acting for and on behalf of the plaintiff prepared a stipulation of settlement and forwarded it to your deponent. It should be noted that the stipulation specifically provides that upon replacement of the building the defendant would pay the additional sum of $37,500, which represented the replacement value as against the actual cash value.

s/
MAX J. GWERTZMAN

Sworn to before me, this
6th day of November, 1974

BERNICE LEVINE
Notary Public, State of New York
No. 41-2327995
Qualified in Queens County
Term Expires March 30, 1975

SPECIAL MULTI-PERIL POLICY

Part Two. This Declarations page with "Policy Provisions-Part One" completes the below numbered

Item DECLARATIONS POLICY NUMBER SMP 601 01 62

1. Named Insured and P. O. Address (Number, Street, Town, County, State & Zip No.): Annette Heyman, Et Al - See End. #1; 10 West Street; Danbury, Fairfield County, Conn.

2. Policy Period: (NOON STANDARD TIME AT LOCATION OF DESCRIBED PROPERTY) From: 4/10/71 To: 4/10/75

REPRESENTATIVE: Agent or Broker: Real Estate Insurance Management Division. Office Address: Burger & Burger, Inc. Town and State: 2295 Kings Highway East, Fairfield, Conn.

# COMMERCE AND INDUSTRY INSURANCE COMPANY

102 MAIDEN LANE

NEW YORK, N.Y. 10005

3. The Named Insured is: ☐ Individual ☐ Corporation ☐ Partnership ☐ Joint Venture ☒ Other: As Exists

4. Location of Premises (Enter "Same" if same location as above): 1. As per MLB22 2. 3. — Occupancy of Premises: As per MLB22

5. Insurance is provided with respect to those premises described above and with respect to those coverages and kinds of property for which a specific limit of liability is shown, subject to all of the terms of this policy including forms and endorsements made a part hereof:

| SECTION I — PROPERTY COVERAGE | Coinsurance Percentage Applicable | LIMIT OF LIABILITY Loc. No. Bldg. No. | Loc. No. Bldg. No. | Loc. No. Bldg. No. |
|---|---|---|---|---|
| DIVISION 1. Cov. A—Building(s) | | $ As per MLB22 | $ | $ |
| Cov. B—Personal Property | | $ Nil | $ | $ |
| Addl. Cov. (Specify) | | $ Nil | $ | $ |
| Loss Deductible Clause No. 1 is ____ applicable. | | Loss Deductible Clause No. 2 is ____ applicable. | | |
| DIVISION 2. Addl. Cov. (Specify) | | $ | $ | $ |

| SECTION II — LIABILITY COVERAGE | LIMIT OF LIABILITY |
|---|---|
| Cov. C—Bodily Injury and Property Damage Liability | Covered under Public Service Mutual Insurance Company Policy $ aggregate |
| Cov. D—Premises Medical Payments | $ each accident |
| Addl. Cov. (Specify) | $ $ $ |

SECTION III — CRIME COVERAGE ☐
SECTION IV — BOILER AND MACHINERY COVERAGE ☐
} Limits as stated in the endorsement, made part of this Policy, if indicated by ☑.

6. Forms and Endorsements made part of this Policy at time of issue: (Insert No. and Edition Date) Form 1803, MLB51(4-71), MLB121(1-71), MLB180(1-71), (9 MLB22(10-66), MLB100(2-71), MLB126(1-71), Form 307-C(

7. Mortgagee: (Name and Address) See Endorsement #2

8. The Total Provisional Premium is $ 15,477.00 and is payable $ 15,477.00 at inception, and $ Nil at each anniversary.

William Campbell Agent.

FOR STATE EXCEPTIONS SEE REVERSE SIDE

In Consideration of the Provisions and Stipulations Herein or Added Hereto and of the Premium Above Specified (or specified in endorsement attached hereto), this Company, for the term of three years from inception date shown above (At Noon Standard Time) to expiration date shown above (At Noon Standard Time) at location of property involved, to an amount not exceeding the limit of liability specified, does insure the insured named in the Declarations above and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all DIRECT LOSS BY FIRE, LIGHTNING AND OTHER PERILS INSURED AGAINST IN THIS POLICY INCLUDING REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY EXCEPT AS HEREINAFTER PROVIDED, to the property described herein while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

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and Coverage B — Personal Property to cover trees, shrubs and plants at the described location against direct loss in any one occurrence by the perils of fire, lightning, explosion, riot, civil commotion or aircraft, but only to the extent such perils are insured against herein. The Company shall not be liable for more than $250 on any one tree, shrub or plant, including expense incurred for removing debris thereof.

E. Extra Expense: The insured may apply up to $1,000 of the sum of the limits of liability specified for Coverage A — Building(s) and Coverage B — Personal Property to cover the necessary extra expense incurred by the insured in order to continue as nearly as practicable the normal operation of the insured's business immediately following damage by a peril insured against to the buildings or personal property situated at the described locations.

"Extra expense" means the excess of the total cost incurred during the period of restoration chargeable to the operation of the insured's business over and above the total cost that would normally have been incurred to conduct the business during the same period had no loss occurred. Any salvage value of property obtained for temporary use during the period of restoration, which remains after the resumption of normal operations, shall be taken into consideration in the adjustment of any loss hereunder.

"Period of restoration" means that period of time, commencing with the date of damage and not limited by the date of expiration of this policy, as would be required with the exercise of due diligence and dispatch to repair, rebuild or replace such part of said buildings or personal property thereof as have been damaged.

The Company shall not be liable under this Extension of Coverage for:

1. loss of income,
2. the cost of repairing or replacing any of the described property, or the cost of research or other expense necessary to replace or restore books of account, manuscripts, abstracts, drawings, card index systems, film, tape, disc, drum, cell and other magnetic recording or storage media for electronic data processing, and other records that have been damaged by a peril insured against, except cost in excess of the normal cost of such repair, replacement or restoration necessarily incurred for the purpose of reducing the total amount of extra expense. In no event shall such excess cost exceed the amount by which the total extra expense otherwise payable under this Extension of Coverage is reduced.
3. any other consequential or remote loss.

G. Replacement Cost: In the event of loss to a building structure covered under this policy, when the full cost of repair or replacement is less than $1,000, the coverage of this policy is extended to cover the full cost of repair or replacement (without deduction for depreciation). Coverage shall be applicable only to a building structure covered hereunder, but excluding carpeting, cloth awnings, air-conditioners, domestic appliances and out-door equipment, all whether permanently attached to the building structure or not.

The Company shall not be liable under this Extension of Coverage:

1. unless and until the damaged property is actually repaired or replaced on the same premises with due diligence and dispatch, and, in no event, unless repair or replacement is completed within a reasonable time after such loss.
2. unless the whole amount of insurance applicable to the building structure for which claim is made is equal to or in excess of the amount produced by multiplying the co-insurance percentage applicable (specified in this policy) by the actual cash value of such property at the time of the loss.

## V. EXCLUSIONS

This policy does not insure under this form against:

A. Loss occasioned directly or indirectly by:

1. enforcement of any local or state ordinance or law regulating the construction, repair or demolition of buildings or structures unless such liability is otherwise specifically assumed by endorsement;
2. electrical currents artificially generated unless loss by fire or explosion as insured against hereunder ensues, and then the Company shall be liable for only such ensuing loss.

B. Loss caused by or resulting from power, heating or cooling failure, unless such failure results from physical damage to power, heating or cooling equipment situated on premises where the property covered is located, caused by a peril insured against. The Company shall not be liable for any loss specifically excluded under the riot provisions of this form.

C. Loss caused by, resulting from, contributed to or aggravated by any of the following:

1. earth movement, including but not limited to earthquake, landslide, mudflow, earth sinking, earth rising or shifting;
2. flood, surface water, waves, tidal water or tidal wave, overflow of streams or other bodies of water, or spray from any of the foregoing, all whether driven by wind or not;
3. water which backs up through sewers or drains;
4. water below the surface of the ground including that which exerts pressure on or flows, seeps or leaks through sidewalks, driveways, foundations, walls, basement or other floors, or through doors, windows or any other openings in such sidewalks, driveways, foundations, walls or floors;

unless loss by fire or explosion as insured against hereunder ensues, and then the Company shall be liable for only such ensuing loss.

## VI. COINSURANCE CLAUSE

The Company shall not be liable for a greater proportion of any loss to the property covered hereunder than the limit of liability under this policy for such property bears to the amount produced by multiplying the coinsurance percentage applicable (specified in this policy) by the actual cash value of such property at the time of the loss.

In the event that the aggregate claim for any loss is both less than $10,000 and less than 5% of the limit of liability for all contributing insurance applicable to the property involved at the time such loss occurs, no special inventory and appraisement of the undamaged property shall be required, provided that nothing herein shall be construed to waive the application of the first paragraph of this clause.

If insurance under Section I of this policy is divided into separate limits of liability, the foregoing shall apply separately to the property covered under each such limit of liability.

The value of property covered under Extensions of Coverage, and the cost of the removal of debris, shall not be considered in the determination of actual cash value when applying the Coinsurance Clause.

## VII. DEDUCTIBLE CLAUSES

A. The following Deductible Clauses are applicable only if so stated in the Declarations:

1. Loss Deductible Clause No. 1: With respect to loss by windstorm or hail to buildings, structures or personal property in the open, the Company shall be liable only when such loss in each occurrence exceeds $50. When loss is between $50 and $500, the Company shall be liable for 111% of loss in excess of $50; and when loss is $500 or more, this deductible shall not apply.
2. Loss Deductible Clause No. 2: With respect to loss by any of the perils insured against other than:
   a. fire or lightning,
   b. windstorm or hail to buildings, structures or personal property in the open,

   the Company shall be liable only when such loss in each occurrence exceeds $50. When loss is between $50 and $500, the Company shall be liable for 111% of loss in excess of $50; and when loss is $500 or more, this deductible shall not apply.

B. No more than one deductible shall apply to loss by windstorm or hail arising out of any one occurrence.

Form MLB-126
(Ed. 1-73)

# REPLACEMENT COST COVERAGE ENDORSEMENT

This endorsement applies only with respect to the premises described in the following Schedule and affords insurance on a replacement cost basis only on the property described below.

## SCHEDULE

| Location Of Premises<br>Location No. Building No. | Property Covered on a<br>Replacement Cost Basis<br>(Specify Coverage A or<br>Coverage B or both) |
|---|---|
| As per MLB22 | Cov. A |

1. Replacement Cost Clause: The provisions and stipulations of Section I of this policy applicable to the property described as covered on a replacement cost basis are amended to substitute the term "replacement cost (without deduction for depreciation)" for the term "actual cash value" wherever it appears in this policy, and the Coinsurance Clause of this endorsement supersedes and replaces all other Coinsurance Clauses otherwise applicable, subject in all other respects to the provisions of this endorsement and of Section I of this policy.

2. This policy does not cover the following property on a replacement cost basis:

   (a) stock (raw, in process or finished) or merchandise, including materials and supplies in connection therewith;

   (b) property of others;

   (c) household furniture or residential contents;

   (d) books of account, abstracts, manuscripts, drawings, card index systems and other records (including film, tape, disc, drum, cell and other magnetic recording or storage media);

   (e) paintings, etchings, pictures, tapestries, statuary, marbles, bronzes, antique furniture, rare books, antique silver, porcelains, rare glassware and bric-a-brac, or other articles of art, rarity or antiquity; or

   (f) carpeting, cloth awnings, air conditioners, domestic appliances and outdoor equipment, all whether permanently attached to the building structure or not.

3. The Company shall not be liable under this endorsement for any loss unless and until the damage or destroyed property is actually repaired or replaced by the insured with due diligence and dispatch.

4. Coinsurance Clause: This Company shall not be liable for a greater proportion of any loss or damage to the property covered under this policy than the limit of liability under this policy for such property bears to the amount produced by multiplying the coinsurance percentage applicable (specified in this policy) by the total of (a) the replacement cost (without deduction for depreciation) of that part of said property which is specifically described as covered on a replacement cost basis and (b) the actual cash value of that part of said property which is covered on an actual cash value basis at the time of loss.

   In the event that the aggregate claim for any loss is both less than $10,000 and less than 5% of the limit of liability for all contributing insurance applicable to the property involved at the time such loss occurs, no special inventory or appraisement of the undamaged property shall be required, provided that nothing herein shall be construed to waive application of the first paragraph of this clause.

   If insurance under Section I of this policy is divided into separate limits of liability, the foregoing shall apply separately to the property covered under each such limit of liability.

   The value of property covered under Extensions of Coverage, and the cost of the removal of debris, shall not be considered in the determination of actual cash value or replacement cost when applying the Coinsurance Clause.

5. This Company's liability for loss on a replacement cost basis, shall not exceed the smallest of the following amounts:

   (a) the amount of this policy applicable to the damaged or destroyed property;

   (b) the replacement cost of the property or any part thereof identical with such property on the same premises and intended for the same occupancy and use; or

   (c) the amount actually and necessarily expended in repairing or replacing said property or any part thereof.

6. The insured may elect to make claim under this policy in accordance with its provisions, disregarding this endorsement, except that the foregoing Coinsurance Clause shall apply; and the insured may make further claim for any additional liability brought about by this endorsement in accordance with its provisions, provided the Company is notified in writing within 180 days after loss of the insured's intent to make such further claim.

This endorsement must be attached to Change Endorsement MLB-20 when issued after the policy is written.

**Concealment, fraud.** This entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof, or the interest of the insured therein, or in case of any fraud or false swearing by the insured relating thereto.

**Uninsurable and excepted property.** This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

**Perils not included.** This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

**Other insurance.** Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

**Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring**

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or

(c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

**Other perils or subjects.** Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

**Added provisions.** The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

**Waiver provisions.** No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

**Cancellation of policy.** This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

**Mortgagee interests and obligations.** If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

**Pro rata liability.** This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

**Requirements in case loss occurs.** The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; **and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss,** signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

**Appraisal.** In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

**Company's options.** It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

**Abandonment.** There can be no abandonment to this Company of any property.

**When loss payable.** The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

**Suit.** No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

**Subrogation.** This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

----------X

002978-G
MEP:LF

ANNETTE HEYMAN, :

Plaintiff :

-against- : REPLY AFFIDAVIT

COMMERCE AND INDUSTRY INSURANCE COMPANY, : No. B 74-330

Defendant :

----------X

STATE OF NEW YORK
COUNTY OF NEW YORK : SS.

EUGENE W. FITZGERALD, being duly sworn, deposes and says:

I make this affidavit in reply to that of SAMUEL J. HEYMAN, sworn to the 13th day of November, 1974.

It is absolutely untrue that the loss adjustment was intended to replace the policy of insurance. The only thing that the parties intended was to agree on a method of adjusting the loss. Such an agreed adjustment does not obliterate policy requirements and, in point of fact, the parties did not intend to void the policy requirement.

The suggestion made by Mr. Heyman that I agreed he could "replace" a 14,000 square foot front building with a 4,000 square foot is a plain misrepresentation of fact. I never agreed to such a thing, and never would have done so, had Mr. Heyman or his representatives asked for it.

On the contrary, the agreed loss adjustment presupposed a replacement structure of like kind or quality to

that which existed at the time of the loss.

It is clear that the main motion papers raise questions of fact that must be resolved by the trier of the facts. This should be done at a plenary trial, rather than summarily on motion papers, because at a plenary trial the trier of the facts will have a full opportunity to see and hear the witnesses, and therefore will be in a better position to assess credibility.

Sworn to before me this
25th day of November, 1974

EUGENE W. FITZGERALD

FREDERICK P. HENDERSON
Commissioner of Deeds
City of New York
No. 3-1000
Commission Expires Jan. 1, 1975

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ANNETTE HEYMAN,

Plaintiff

vs.

COMMERCE AND INDUSTRY INSURANCE CO.

Defendant.

CIVIL ACTION

NO. B 74-330

AFFIDAVIT IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

STATE OF CONNECTICUT )
) ss.: Westport, NOVEMBER 13th, 1974
COUNTY OF FAIRFIELD )

SAMUEL J. HEYMAN, being duly sworn, deposes and says:

1. In the course of my negotiations with representatives of the defendant leading to settlement of the claim of the plaintiff herein, it was agreed that each party would waive any and all claims which she or it had under the policy of insurance issued by the defendant to the plaintiff.

2. At no time in the course of these discussions was any mention made that the settlement would in any way be conditioned upon the construction of a building identical in size to that which was destroyed.

3. On the contrary, it was our specific understanding, as embodied in the settlement agreement, that the sum of $187,500.00 would be paid without regard to any otherwise applicable requirements of the policy and in consideration of the plaintiff's relinquishment of her right to claim the full amount of her loss as recited in her affidavit. In other words, the settlement agreement was intended as a full and final resolution of all of the issues under the policy and was entered into by both parties in order to effect a final disposition of this matter.

4. At the time of execution of the settlement agreement, the "replacement building" was already under construction as recited in the agreement, the foundation had been completed, and the size of the new building could have been ascertained by a visual inspection.

5. At no time did the defendant ask for or receive any assurances that the new building would be identical in size to that which was destroyed and the amount of the settlement was not predicated upon that assumption, nor would the amount of the settlement have been sufficient to finance construction of a building identical in size to that which was destroyed or acceptable to me had that requirement been imposed.

6. I would not have accepted the sum of $187,500.00 in settlement of the plaintiff's claim under the policy if such sum was offered subject to the requirement that the plaintiff construct a building identical in size to that which had been destroyed, but would have preferred to pursue my remedies under the policy for the full amount of the loss as stated in the affidavit. Furthermore, it would have been fruitless to enter into a settlement agreement, which as defendant claims, was conditioned upon identical replacement of the building when I knew at the time of the agreement that the hypothetical condition had already been precluded.

Samuel J. Heyman

Subscribed and sworn to before me, this 13th day of NOVEMBER, 1974.

Notary Public
My Commission expires April 1, 1978.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

| | | |
|---|---|---|
| ANNETTE HEYMAN | : | |
| | : | |
| -vs- | : | Civil No. B 74-330 |
| | : | |
| COMMERCE AND INDUSTRY INSURANCE COMPANY | : | |

RULING ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT

This case comes before the Court on cross-motions for summary judgment filed by the parties under Rule 56, Fed. R. Civ. P. Both sides represent that if their respective interpretations of the new agreement are accepted by the Court, no genuine issue of facts remains to be decided and that each claims summary judgment as a matter of law. After having reviewed the pleadings, the exhibits, affidavits, memoranda and all other papers, the Court grants the plaintiff's motion for summary judgment and denies the defendant's motion.

Facts

The plaintiff had several properties in Connecticut and Massachusetts insured against fire loss with the defendant, Commerce and Industry Insurance Company, through a policy issued by an agent of said company in Fairfield, Connecticut. Among those properties was a shopping center in Westfield, Massachusetts. On September 10, 1972, a fire

totally destroyed the auto-service station and warehouse located in the aforesaid shopping complex, which premises were leased to Sears, Roebuck and Company.

The plaintiff gave the defendant immediate notice of her fire loss and filed a written proof of loss in the amount of $247,265 on December 14, 1972, as required under the terms of said policy. The defendant contested the amount of the claimed loss due to the plaintiff and as a result no payments under the policy were paid by the insurer. However, while this impasse continued, on August 2, 1973, the defendant, acting through its Assistant Secretary Walter J. Owens, executed a settlement agreement, wherein it was agreed in relevant part as follows:

> "WHEREAS, insured intends to construct a new building at the Sears, Roebuck complex in order to replace the building which was destroyed and construction of the new building has already commenced,
>
> "WHEREAS, insured has made a claim under the above-mentioned insurance policy in the amount of $247,265 as evidenced by the insured's affidavit, dated December 14, 1972,
>
> "WHEREAS, insurer has disputed the amount of the loss sustained by insured as a result of the above-mentioned fire,
>
> "WHEREAS, in an effort to avoid litigation, the parties have agreed to compromise and settle the above-mentioned claim,
>
> "WHEREAS, in consideration of the mutual agreements herein contained, it is agreed as follows,

"1. In consideration for payment by insurer to insured of $187,500, the parties for themselves, their successors and assigns, agree to remise, release, and forever discharge any and all claims which they may have against each other arising under the above-mentioned insurance policy including, but not limited to, insured's claim in connection with the above-mentioned fire loss.

"2. Payment of the $187,500 shall be made as follows:

"$150,000 to be paid, all cash, upon execution of this agreement and $37,500, to be paid, all cash, when insured has proceeded to the stage of construction of the new building where said building shall be watertight."

The defendant insurer did pay to the plaintiff the sum of $150,000 on the date of the execution of the aforesaid agreement, August 2, 1973, but has failed and refused to pay the balance of $37,500, notwithstanding the fact that the plaintiff completed the building on August 22, 1973, and gave notice to the defendant of her compliance. Since the date of the settlement agreement, the plaintiff has made no claim under the insurance policy, and brings the action to enforce the terms of the settlement agreement, together with consequential damages.

The defendant insurance company has admitted the execution of the subsequent settlement agreement in its answer, but denies that such agreement constituted an unconditional promise to pay the plaintiff the total sum of $187,500. The insurer claims that while $150,000, the first payment of said

sum, has been paid, the balance of $37,500 was to be paid only if the insured's destroyed building was replaced by a new building in essentially the same condition, as it existed prior to the fire loss. The company now claims that since the plaintiff did not replace the identical building, as required under the terms of the policy, but actually constructed a smaller building, he was entitled to recover only the actual cash value of the original building at the time of the fire, namely $150,000, which sum has already been paid. The defendant has also filed a special defense alleging that the policy contained a provision that suit could only be brought, but within twelve (12) months from the inception of the loss.

The crux of the defendant's contention is that the original insured premises comprised an area of 14,000 square feet, while the newly erected building has an area of approximately 4,000 square feet. The insurer's posture is that the parties agreed that the actual cash value of the damaged premises at the time of the fire was $150,000. The company concedes that it was committed to unconditionally pay that sum under the terms of the policy. The insurer represents that the replacement cost provision in the policy was really designed for the benefit of the plaintiff; so that when an insured replaces a building at a cost that is substantially

more than the actual cash value of the damaged building, it would be unfair not to fully reimburse the property owner for his or her cost of replacing the original building. However, the complement of this precept requires that if the insured chooses not to replace the building, there is no sound reason for reimbursing him for an expense which he did not actually incur.

The insurance company's position is hinged on the third paragraph of the new agreement which says,

> "WHEREAS, insured intends to construct a new building at the Sears, Roebuck complex in order to replace the building, which was destroyed and construction of the new building has already commenced," (emphasis added).

It points out that according to the dictionary definition, the word "replace" means to "to restore to a former condition." The defendant thus argues, that since the negotiations which resulted in the new settlement agreement were conducted with reference to the parties' rights under the insurance policy contract, it intended that the additional $37,500 payment would only be made if the premises were restored by the replacement of an equivalent building, and since this was not done it has fulfilled its obligation under the insurance policy by paying the plaintiff the actual cash

value of the damaged building.

The plaintiff's proof of loss, dated December 14, 1972, sets out her fee title ownership of the property on the day of the fire, subject to a mortgage and several outstanding leases. Her affidavit certifies that a breakdown of the items constituting the replacement cost of the burned building totaled $247,265. At the time the settlement agreement was signed, the replacement building was already under construction; the foundation had been completed and the size of the new building could have been ascertained by a visual inspection. There was no evidence that either the plaintiff or her agents ever made any representation that the new building would be identical in size with the one destroyed or that the amount of settlement was predicated upon that assumption. In fact, the plaintiff asserts that the amount of the settlement would not have been sufficient to finance such a building.

On August 2, 1973, when the parties executed said new agreement, a dispute already existed between the parties, as to the amount of the fire loss and how much the defendant should rightfully pay under the terms of the policy. When the parties executed the new agreement, they intended to resolve and to end, once and for all time, a settlement of that fire loss.

Discussion of Law

The plaintiff alludes to the new agreement as a novation between the parties of the insurance policy, whereas the Court considers the matter as a discharge by merger. The Restatement of Contracts § 424 (1932), defines novation as "a contract that (a) discharges immediately a previous contractual duty or a duty to make compensation, and (b) creates a new contractual duty, and (c) includes as a party one who neither owed the previous duty nor was entitled to its performance." This interpretation is supported in the case of Riverside Coal Co. v. American Coal Co., 107 Conn. 40, 44-45 (1927), where the court said:

> "The court, in adopting the first of these alternative contentions, refers to the transaction as a 'novation,' which term is usually used with reference to instances in which a new party is introduced into the new contract, while 'substitute contract' is the designation commonly employed to cover agreements between the same parties which supersede and discharge prior contract obligations. 3 Williston on Contracts, § 1865. There is, however, no distinction so far as concerns the legal effect.
>
> "We think that the language of the second contract is, of itself, clearly sufficient to place it in the category of substitute contracts."

Volume 17 Am. Jur. 2d, Contracts § 483 (1964) defines "a merger of contract" in the following terms:

"The general rule is that where the parties enter into a written contract all prior negotiations, understandings, and verbal agreements on the same subject are merged in the written contract, and are accordingly extinguished. Also, upon the execution of a valid substituted agreement, the original agreement becomes merged into it and is extinguished. One contract will not, however, merge into a later one so as to extinguish the earlier one unless they deal with the same subject; insofar as they deal with different subjects the earlier contract is not merged and is therefore not extinguished." (footnotes omitted).

Also see, 15 Williston on Contracts, § 1875 (Jaeger ed. 1972) and Restatement of Contracts § 443 (1932).

A reading of the general tenor of the second contract and consideration of the circumstances under which it was executed, establishes a reasonable basis for the Court to find that the parties intended the company's fire loss obligations under the policy to be merged into this final agreement. The general mutual release provisions of the latter agreement clearly establish this. It provides:

"In consideration for payment by insurer to insured of $187,500, the parties, their successors and assigns, agree to remise, release and forever discharge any and all claims which they may have against each other arising under the above-mentioned policy including, but not limited to, insured's claim in connection with the above-mentioned fire loss."

The Court is persuaded from the overall record, that these mutual release provisions were intended by the parties to determine and end their dispute. There were no restrictive conditions as to the size, shape, or construction

material required to be used in the new building. The only condition precedent to final payment provided that when the building was "watertight," indicating an external completion of the structure, the balance of the total consideration would be paid. This provision justified and validated the payment of said sums under the terms of the policy[1/] and was not inconsistent with the overall purpose of the release. Actually the agreed sum was $59,765, less than the figure of $247,265 originally claimed in the plaintiff's proof of loss. Obviously, the final consideration was a compromise figure, to which both parties agreed. It contained no condition precedent, as to the type of building required to be constructed, nor the number of minimum square feet of floor space, nor the cubic feet of building space nor any other similar restriction.

The defendant's allegation of an affirmative defense that contrary to the terms of the policy, suit was not commenced within one year and the action is barred, does not apply. Even were it conceded arguendo that the policy contained such a suit limitation, since recovery is founded in the merged agreement, such a restrictive condition would not apply.

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1/ Paragraph 3 of the Replacement Cost Coverage Endorsement provides:

> "The Company shall not be liable under this endorsement for any loss unless and until the damage or destroyed property is actually repaired or replaced by the insured with due diligence and dispatch."

The Court finds that the terms of the final written agreement and mutual release have been fully performed by the plaintiff and that she is entitled to recover the sum of $37,500, together with statutory interest from August 22, 1973, when the plaintiff notified the defendant that the building had been made watertight, thus fulfilling the only condition precedent affecting payment under the agreement. SO ORDERED.

Dated at Hartford, Connecticut, this 6th day of March, 1975.

T. Emmet Clarie
Chief Judge